

## **State Water Resources Control Board, Administrative Hearings Office:**

### **Frequently Asked Questions\*\***

This document is intended for anyone appearing before the AHO, whether represented by an attorney or not. You may also wish to review the AHO's "Preparing for Your First Hearing" document, available on the AHO's webpage under the heading, "AHO Procedures & FAQs". If you have received a Notice of Public Hearing (Hearing Notice), that document will contain helpful information as well.

#### **1. What is the Administrative Hearings Office?**

The Administrative Hearings Office (AHO) is a quasi-judicial body that hears disputes concerning California water issues. The AHO is an "independent organizational unit" within the State Water Resources Control Board (State Water Board or Board) that provides a "neutral, fair, and efficient forum for adjudications." (Wat. Code, § 1110, subd. (a).)

The purposes of the AHO are to "provide qualified, impartial hearing officers, to ensure that water rights matters, including water-related cannabis enforcement matters, are resolved in a timely manner, and to provide the Board flexibility to assign hearing officers to other matters, such as those involving water right change petitions and other matters concerning water right permits and licenses." (Wat. Code, § 1110, subd. (b).) The AHO includes hearing officers and staff who conduct administrative hearings. In most matters, the AHO prepares a proposed order and transmits it to the Board for the Board's consideration.

For the 2020 report of the AHO's activities, please see the [recording of the State Water Board's Oct. 6-7, 2020 meeting](#). [Attached are the PowerPoint slides presented during that meeting](#).

#### **2. What is a water-right hearing?**

A water-right hearing is an evidentiary hearing conducted by a hearing officer. In this type of proceeding, participating parties have opportunities to present relevant evidence and testimony. An "administrative record," is developed before and during the hearing. The administrative record contains the evidence the Hearing Officer uses to prepare the proposed order. Documents from the Water Board's files, all exhibits offered or admitted into evidence, and all recordings of the proceedings, are parts of the administrative record for each case. In most proceedings, the hearing officer uses the information in the administrative record to prepare the proposed order. When the hearing officer is preparing the proposed order, the hearing officer will consider only testimony given during the hearing and exhibits that have been admitted into evidence.

The AHO currently holds its hearings electronically via Zoom. The AHO has a YouTube live link for its hearings, so any interested member of the public may watch them.

### **3. What types of matters does the AHO hear?**

The AHO holds hearings in: (A) enforcement matters; (B) water-right application and permitting matters; (C) fully appropriated stream petitions; and (D) matters involving water-right complaints by one party against another party (or multiple parties); and (E) other matters.

Most AHO hearings in enforcement matters involve administrative civil liability complaints or proposed cease and desist orders in water-right matters. AHO officers also may preside over proposed revocations of water-right permits and licenses. (See Wat. Code § 1112.)

The Board, or the Executive Director acting under authority delegated by the Board, may assign water-right application and permitting matters, and other matters to the AHO for hearings. The Board or the Executive Director also may ask that an AHO hearing officer assist the Board or a Board Member in conducting hearings, and may ask the AHO to perform additional work, including nonadjudicative matters, mediations, and overseeing investigations. (See Wat. Code, § 1112, subd. (c).)

For more information about how water-right permitting matters may be assigned to the AHO, please see the [AHO-DWR Processes Memo](#).

### **4. How may I request a hearing?**

For enforcement matters, the person who receives an administrative civil liability complaint or proposed cease and desist order is called the “respondent.” The Division of Water Rights (Division) will notify the respondent if the Division is considering taking an action for which the respondent has a right to a hearing. This normally happens when the Division sends the respondent an administrative civil liability complaint or a proposed cease and desist order.

The Division’s letter accompanying either of these documents will explain that the respondent must request a hearing within 20 days. If the respondent does not do this, then the respondent waives his, her or its right to a hearing. (Wat. Code, §§ 1055, subd. (b), 1834, subd. (b).)

If you receive a letter from the Division stating that you have a right to a hearing, and if you want the AHO to hold a hearing in your matter, then you must take further action by filing a written request for a hearing. The Division’s letter will provide information about what you need to do to submit your request for a hearing. If you do not file a written request for a hearing by the deadline, the Board may issue a final order without a hearing.

For other matters, whether the AHO will hold a hearing will depend on the specific facts. Normally, the AHO will hold a hearing only if there are unresolved issues that need to be resolved through a hearing process before the Board can decide how to proceed.

### **5. Why have I received a Hearing Notice?**

For enforcement matters, after a respondent requests a hearing, the AHO will issue a Hearing Notice. In other matters, after the Board has assigned the matter to the AHO, the hearing officer may issue a Notice of Pre-Hearing Conference and Hearing Notice or a Hearing Notice to parties involved in the matter.

A Hearing Notice is a document describing the hearing issues and procedures in a specific case. The purpose of a Hearing Notice is to inform the parties and other interested persons about the hearing, the action or actions the AHO may take or recommend that the Board take, the issues to be considered during the hearing, hearing procedures, and contact information. The Hearing Notice is important because it notifies participants about the details of the hearing, how to participate in the hearing, and the hearing procedures.

## **6. How can I prepare for my hearing?**

The Hearing Notice will provide information about what each party needs to do to prepare for the hearing. For some hearings, the hearing officer may conduct one or more pre-hearing conferences to discuss issues like schedules, the scope of the hearing, the format of exhibits, and hearing procedures. The Hearing Notice will state if there will be a pre-hearing conference and the date and time for such a conference. The AHO does not hold pre-hearing conferences in every matter.

The Hearing Notice informs parties and others interested in the subject of the hearing of:

- Date, time, and place of the hearing and Zoom log-in information for the hearing.
- The action or actions that the AHO and the Board may take.
- Issues that are the subjects of the hearing.
- Hearing procedures.
- Telephone and e-mail contacts for more information.

## **7. Do I need an attorney?**

There is no requirement that an attorney represent a party during the hearing. Many of the parties who appear before AHO hearing officers represent themselves during the proceedings.

However, if the hearing may involve complex legal issues, the party should consider hiring an attorney to advise and represent the party before, during and after the hearing. Parties to hearings involving complex legal issues that do not have attorneys often will be at a disadvantage. Some attorneys provide legal services free of charge, called “pro bono representation.” The AHO maintains a list of attorneys that offer pro bono representation to parties without an attorney in water rights cases before the AHO. This list is available at [https://www.waterboards.ca.gov/water\\_issues/programs/administrative\\_hearings\\_office/docs/2021/pro\\_bono\\_aho.pdf](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/pro_bono_aho.pdf).

## **8. What are my due process rights as the respondent in an enforcement hearing before the AHO?**

For enforcement actions, “due process of law” means:

- The respondent must receive reasonable notice of the basis of the enforcement action.
- The respondent must receive reasonable notice of the hearing dates and procedures.

- The respondent must have opportunities to present evidence and arguments.
- The hearing officer and staff will prepare proposed orders based only on evidence in the administrative record that has been admitted into evidence.
- The hearing officer and staff will not discuss substantive issues or major procedural issues with one party or the party's representative unless all other parties or their representatives are present.
- The hearing officer will be impartial and free from bias, prejudice, or interest in the proceeding.

## **9. What is an NOI and why is it required?**

Except for enforcement matters, the Hearing Notice normally will direct each party to file a Notice of Intent to Appear (NOI). The Hearing Notice will provide the deadline and procedures for filing NOIs.

The NOI informs the AHO that the party or the party's representative plans to participate in the hearing on its scheduled date or dates. The NOI informs the hearing officer which witness each party intends to ask to testify during the hearing.

A party's level of participation in a hearing may range from presenting only a non-evidentiary policy statement to presenting a case-in-chief by calling witnesses, submitting exhibits, and cross-examining the witnesses of other parties.

For hearings where NOIs are required, if a party intends to present witness testimony and exhibits, the Hearing Notice will provide the procedures each party must follow for witness testimony and exhibits. For example, a party may be required to list in the NOI each witness's name, whether any witness is an expert witness, the general subject of each witness's testimony, and the estimated length of time each witness will need to summarize his or her written testimony. The Hearing Notice also may require each party planning to offer testimony for the administrative record to submit the party's witnesses' written proposed testimony by the deadline for filing exhibits.

As described in the Hearing Notice for the particular matter, the AHO hearing officer normally will allow witnesses only limited amounts of time to summarize their written proposed testimony. The AHO recommends that each witness prepare slides that the witness may use to facilitate a summary of his or her testimony. Each party normally must mark the set of summary slides for each witness as a separate exhibit and file it with the AHO with the party's other exhibits on or before the exhibit filing deadline.

The Hearing Notice normally will explain that the NOI also must contain the party or party representative's contact information (such as e-mail or U.S. mail or both). This informs the AHO of how each party prefers to be contacted regarding the proceeding. The AHO will mail a service list of parties to each person or entity that has submitted a Notice of Intent to Appear. The service list will indicate if any party is unwilling to accept electronic service of documents. Parties that are unwilling to accept electronic service of documents will experience delays in receiving paper copies.

## **10. What can I expect during my hearing?**

The role of the AHO is to administer hearings independently in a neutral, fair, and efficient forum. As with trials in civil or criminal court, the party bearing the burden of proof will begin and present its entire case-in-chief before the other party presents its case-in-chief. The hearing normally will proceed in the following order:

- Hearing officer's explanation of hearing format.
- Appearances by parties and party representatives (where each person states his or her name and, if appropriate, the party he or she represents).
- Presentation of non-evidentiary policy statements from interested persons who will not be participating in the hearing as parties.
- Presentations of case-in-chief by each party, including:
  - The party's opening statement.
  - The hearing officer giving each witness the oath to tell the truth (just as if they were testifying in court, and subject to the same penalties for false statements).
  - Summaries of the party's witnesses' written proposed testimony (usually no more than 30 minutes total for all witnesses for each party).
  - Cross-examination of the party's witnesses (unlike in court trials, here, the cross-examination is not limited to the testimony provided in the direct testimony).
  - Re-direct examination and re-cross examination of the party's witnesses, if allowed by the hearing officer.
  - Questions from the hearing officer (these questions may occur at any time, but normally will be after all other parties have completed their cross-examination of a party's witness)
  - Submitting exhibits into evidence, with opportunities for objections by other parties.
- Presentations of parties' rebuttal evidence.
- Closing statements.

Depending on how complex the issues are, the hearing officer may direct the parties to file closing briefs after the hearing instead of making oral closing statements.

## **11. How will the AHO conduct hearings if the parties cannot meet in person?**

Unless otherwise noted, if parties are prohibited from meeting in person (such as during the COVID-19 pandemic), hearings will be conducted by Zoom without any physical location. The AHO may continue to hold hearings by Zoom after the COVID-19 pandemic ends. Please refer to the Hearing Notice for the Zoom log-in information. The AHO strongly urges all parties to participate in hearings via video and audio conference, although the AHO also will provide instructions for telephonic (audio-only) participation.

The AHO provides instructions for how to log into Zoom and typically offers suggestions for recommended hearing practices in the Hearing Notice.

The AHO livestreams and records each hearing and other proceeding. The AHO records each hearing and other proceeding and posts audio-plus-video recordings, and a Zoom-generated informal transcript, of the hearing or other proceeding as part of the administrative record. The AHO saves all the files in the administrative record in each matter in an electronic format. Please refer to the Hearing Notice for specific instructions about document format and transmittal to other parties and to the AHO.

The AHO does not provide a court reporter for any of its proceedings. If a party wishes to have a court reporter transcribe any AHO proceeding, then that party should inform the AHO by e-mail (with copies to the other parties) before the hearing. At the beginning of any AHO proceeding, the hearing officer normally will ask whether a court reporter is present and, if so, will ask the court reporter to identify himself or herself. AHO staff then will authorize the court reporter to record the proceeding. The Hearing Notice will usually contain a link to the AHO's YouTube channel livestream for hearings. This information also is available on the AHO webpage.

Whether a court reporter is present or not, the AHO will record the proceeding through Zoom and post audio-plus-video files and an informal Zoom-generated transcript of the proceeding electronically. Please refer to the Hearing Notice for more information.

#### **12. Will participants be allowed to screen-share during any AHO virtual proceeding?**

Participants will not be allowed to screen-share during any AHO proceeding. During AHO hearings, one of the AHO staff will be available to screen-share exhibits and to scroll through presentation slides or exhibits at the request of the speaker. AHO staff will be available during other AHO proceedings to screen-share, as appropriate, if a participant would like to display a document or other file. If a party anticipates requesting AHO staff to display a document or file during an AHO proceeding besides a hearing, then the party should provide the document or file to the AHO by the proceeding by e-mail, with cc's to everyone on the service list.

#### **13. How can I contact the AHO if I am having trouble accessing an AHO proceeding?**

The AHO's phone line and e-mail account are monitored during normal business hours. During the COVID-19 pandemic, we ask for your patience because our responses to messages may be delayed.

You may leave a message at (916) 341-6940 or by e-mail [AdminHrgOffice@Waterboards.ca.gov](mailto:AdminHrgOffice@Waterboards.ca.gov).

#### **14. What are the rules for conducting an AHO hearing?**

The AHO conducts hearings according to the rules in the Water Code and California Code of Regulations, title 23, sections 648-648.8 and 760. These regulations incorporate most of chapter 4.5 of the Administrative Procedure Act (Government Code sections 11400-11475.70), Evidence Code sections 801-805, and Government Code section 11513. The Hearing Notice describes the scope of hearing, deadlines, and other pertinent and specific information for each hearing.

## **15. How does the AHO hearing officer prepare a proposed order?**

When preparing a proposed order, the hearing officer normally considers only evidence in the administrative record that the hearing officer has admitted into evidence. Hearing officers may consider other publicly available information that may be officially noticed. If the hearing officer does this, then the proposed order will describe the evidence of which the hearing officer has taken official notice.

The hearing officer may also consult with technical staff within the AHO and staff in other divisions and offices of the Water Board. The hearing officer and other AHO staff members may consult with permitting staff of the Division of Water Rights, attorneys in the Board's Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding. Typically, the Hearing Notice will identify the hearing officer and hearing team. The hearing officer will not consult with members of staffs of any other Water Board section or office that is participating in or has participated in the hearing as a party or a party's representative.

After the hearing officer transmits the AHO's final proposed order to the Clerk of the State Water Board under Water Code section 1114, subdivision (c)(1). AHO staff may discuss the proposed order with other hearing team members during the Board's process for considering the proposed order.

## **16. What is an "ex parte" communication?**

An "ex parte" communication is a communication between a hearing officer, an AHO staff member, or another member of the hearing team and one party or one party's representative, when all of the other parties or their representatives have not been notified of the communication or have not been given opportunities to participate in the communication. An ex parte communication could include a communication between a Board staff member who is on the hearing team or a Board member and one or more parties (or their representatives) about a hearing, when all of the other parties or their representatives have not been notified of the communication or have not been given opportunities to participate in the communication.

In enforcement proceedings, there normally is a Prosecution Team, which includes attorneys from the Board's Office of Enforcement and staff from the Division of Water Rights Enforcement Section. The Prosecution Team is a party to such proceedings and is subject to these ex parte communication rules.

The AHO normally prohibits all ex parte communications involving AHO hearing officers or AHO staff. This means that parties to a hearing may not communicate, off the record, with AHO hearing officers or AHO staff about the substance of the hearing or major hearing procedures unless the AHO has notified all other parties of the proposed communication and given all other parties opportunities to participate in the communication or discussion.

To avoid ex parte communications, all communications about a hearing with the AHO hearing officer or other AHO staff, or with Board staff on the hearing team or Board members, should be through e-mails with the e-mail addresses of all other parties included on the "cc" line of the

e-mail, or by paper letters, with all other parties listed on the letter's "cc" list. Upon receipt of communications addressed to the AHO, or communications to Board staff or Board members concerning matters before the AHO, the AHO will file copies of the communications in the folder on the Board's FTP site for the matter.

Parties to a hearing may communicate with each other (such as during settlement negotiations or to make arrangements about exhibits) at any time. As long as no AHO hearing officer or other AHO staff member is involved, these are not improper ex parte communications.

### **17. What is the "administrative record"?**

The administrative record for a hearing is the record that includes all exhibits offered or admitted into evidence, and all recordings of the proceedings. The Board uses the administrative record as a basis for its proposed order. The administrative record also is used as the basis for judicial review if a party challenges the Water Board's final order in court.

Normally the administrative record will be posted electronically before the AHO sends the Hearing Notice. The AHO may add additional documents to the administrative record before, during or after the hearing. Anyone may access the administrative record for any AHO proceeding by accessing the AHO folder for the hearing (and the sub-folders within that folder) on the Board's FTP site. Each AHO hearing notice provides information about how to access the Board's FTP site and the AHO folder for the proceeding.

Except for matters subject to official notice, the hearing officer members normally will not consider evidence that is not in the administrative record and that has not been admitted into evidence while preparing the proposed order.

### **18. What is "evidence"?**

Evidence is testimony, writings, material objects or other things that a party offers to prove or disprove something. The Government Code provides: "Any relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs..." (Gov. Code, § 11513 (c).)

During the hearing, the hearing officer may admit some evidence for a limited purpose. For example, the hearing officer may admit hearsay evidence subject to the limitations stated in Government Code section 11513. Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Hearsay evidence is not normally admissible unless it is admissible under legally recognized exception to the hearsay rule. Government Code section 11513 provides that hearsay evidence may be admitted if it is used to supplement or explain other evidence, but if a party objects, that hearsay evidence cannot support the Board's finding unless it would be admissible over objection in a civil trial court.

### **19. What are "exhibits"?**

Exhibits are written, documentary, record, or physical evidence that a party offers into evidence at the hearing. Exhibits may include the written proposed testimony of witnesses, the



qualifications of any expert witnesses, and other evidence like photographs, technical reports, utility bills, etc. The Hearing Notice will explain how each party should mark its exhibits. Each party must designate each of his, her or its exhibits with an exhibit number. Typically, this is an abbreviated form of the party's name followed by a hyphen and a number (e.g., "Last Name-1" for the Respondent's first exhibit or "PT-1" for the Division of Water Rights Prosecution Team's first exhibit). At least one of a party's witness's written proposed testimony should refer to each of the party's exhibits that are not written proposed testimony. Written proposed testimony does not need to be signed because the witness will take the oath during the hearing and then confirm that the written proposed testimony is his or her testimony for the hearing.

The AHO may also offer staff exhibits into evidence. Staff exhibits are documents from the Water Board's records that have been compiled by AHO staff and are electronically available on the Board's FTP site in the folder for the matter,

For most hearings, the Hearing Notice will direct the parties to upload their exhibits and an index listing each exhibit to the AHO's FTP website, on or before the exhibit submittal deadline specified in the Notice. The Hearing Notice normally also will direct each party to transmit two paper copies of each exhibit and the party's exhibit identification index to the AHO.

During a hearing, after the summaries of direct testimony, cross-examination and follow-up questioning of all of a party's witnesses are completed, the hearing officer will ask the party's representative if the party wants to submit his, her or its exhibits into the evidentiary hearing record. Other parties' representatives then may state their objections and the hearing officer will rule on each objection and state which exhibits are admitted into evidence. When preparing the hearing officer's proposed order, the hearing officer will not consider exhibits not admitted into evidence, but these un-admitted exhibits will be in the administrative record.

For more information regarding exhibits, see the Hearing Notice for each matter.

## **20. What is an expert witness?**

An expert witness is a type of witness who is permitted to offer an opinion that goes beyond most people's common experience, because the witness has special knowledge, skill, experience, training, or education in the subject matter on which he or her offers an opinion. An expert witness testifies to help the hearing officer understand the evidence or determine a disputed factual issue. A person does not need to be an expert to testify to facts based on his or her personal knowledge.

## **21. What is an "interested person"?**

An interested person is a person or entity who is not a party to a hearing but wants to present a non-evidentiary policy statement or other comments. Statements of interested persons are not made under oath and are not evidence on which a proposed order may be based. People presenting policy statements are not subject to cross-examination, but the hearing office may ask questions to clarify testimony. Interested persons may not present evidence at the hearing and may not cross-examine witnesses.

## **22. What is a “site visit”?**

Sometimes the AHO will decide to visit the property or resource at issue in the hearing. The parties, their representatives, the hearing officer and AHO staff, and interested members of the public may attend the site visit. The purpose of the site visit is to help the hearing officer identify relevant geographical features and landmarks. During the site visit, the hearing officer may ask the parties or their representatives clarifying questions about the property or resource. The administrative record will include evidence that the site visit occurred. This evidence may be a recording of discussions that occurred during the site visit, recordings or photographs of things the hearing officer saw during the site visit, or a report or summary of the site visit.

## **23. What happens after a hearing ends?**

The hearing officer may direct the parties to file closing briefs after the hearing. Closing briefs give the parties opportunities to summarize the evidence and make legal arguments. In most cases, the AHO hearing officer has 90 days after the parties submit their closing briefs to prepare a proposed order and to transmit it to the Board.

The AHO hearing officer may circulate a draft proposed order to the parties for their review and comments before the hearing officer prepares the final proposed order and transmits it to the Board. If the AHO hearing officer does this, then the deadline for transmittal of the final proposed order to the Board will be 90 days after the parties have submitted their comments on the draft proposed order.

After the hearing officer transmits the proposed order to the Board, the Board has 90 days to decide whether: (1) to adopt the proposed order; (2) to reduce or otherwise mitigate the proposed administrative civil liability and adopt the balance of the order; (3) to make technical or minor changes and adopt it as the Board's order; (4) to reject the proposed order and remand the case to the AHO for further proceedings; or (5) to reject the proposed order and decide the case upon the record or upon an agreed statement of the parties. (See Wat. Code § 1114.)

## **24. Who may challenge a final Board order?**

After the State Water Board adopts a final order following an AHO hearing, any party may file a petition for reconsideration of all or part of a final order with the Board. Any such petition must be filed within 30 days of the adoption of the final order. (Wat. Code § 1122.) The Board may reconsider its order based on the administrative record and the parties' arguments, or the Board may hold a further hearing, or direct the AHO to hold a further hearing, to receive additional evidence. Any party may file an action in court challenging the Board's final order. (See Wat. Code, § 1126.)

**\*\*** The general information provided here is not intended to alter or supersede applicable law or regulations regarding the conduct of AHO hearings.